S. LOURDENADIN

v.

M. RATNAVALE NEE ANNALAKSHMI VATTIVELU & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[CIVIL SUIT NO. 1166]
20 OCTOBER 1983

LAND LAW: *Private caveat - Application to remove second caveat - First caveat was removed without personal service of intention to remove on caveator - Second caveat also based on different grounds from first caveat.*

The 2nd defendant applied by way of a summons-in-chambers to remove a private caveat entered by the plaintiff against certain land in Kenny Hill, Kuala Lumpur.

There was a written agreement executed on 14 July 1972 between the plaintiff and the 1st defendant in which the 1st defendant agreed to sell the land to the plaintiff subject to the approval of the Ruler-in-Council being obtained for extension of time within which to erect a building on the land.

After a series of letters, the 1st defendant's solicitors alleged that the agreement terminated on 23 July 1973. Plaintiff's solicitors declared the allegation wrongful. The 1st defendant then entered into an agreement with the 2nd defendant, her brother-in-law, and the land was transferred to and registered in the 2nd defendant's name on 13 March 1974. The plaintiff lodged a caveat against the said land. The caveat was removed following the gazetting of a notice of intended removal of the caveat after attempts at personal service of the notice failed. The plaintiff lodged a second caveat which resulted in the present application by the 2nd defendant.

Held:

[1] The Court has no power to revive, renew or continue a caveat after its lapse at the instance of the same applicant on the same ground or grounds.

[2] In this case the plaintiff filed the second caveat on different grounds from the first caveat. Plaintiff also was not personally served and did not have knowledge of the intended removal and so could not apply to Court for extension of her first caveat. The caveator must have notice and actual knowledge of the application to remove the caveat.

[3] A caveat is like an interlocutory injunction. In this case there is a serious question to be tried and on a balance of convenience it is better to allow the second caveat.

[Application dismissed with costs.]

Cases referred to:
Arul Chandran v. Rajaratnam [1979] 2 MLJ 172
Damodaran v. Vasudevan [1974] 1 MLJ 128
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 214
Zaibun SA binti Syed Ahmad v. Loh Koon Moy [1982] 2 MLJ 92; [1982] CLJ (Rep) 58

Legislation referred to:
National Land Code 1965, ss. 326 (2), 432
Rules of the High Court 1980, O. 25
Specific Relief Act 1950, s. 11(2)

For the plaintiff - T. Thomas; M/s. Skrine & Co.
For the 2nd defendant - C. V. Kumar (G. Sri Ram with him); M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

LC Vohrah J:

This is an application by way of summons-in-chambers on the part of the second defendant for an order that a private caveat entered by the plaintiff against the register document of title to a piece of land in Kenny Hill held under Grant No. 17 for Lot No. 9987 ("the land") be removed (See Encl. 32).

The brief facts so far as they are relevant to this application are as follows. By a written agreement executed on 14 July 1972 between the plaintiff and the first defendant ("the first agreement"), the plaintiff agreed to buy and the first defendant to sell the land subject to the approval of the Ruler-in-Council being obtained for extension of time within which to erect a building on the land. Thereafter there ensued a series of letters between the first defendant's solicitors and the plaintiff's solicitors from 15 November 1972 (See Exh. MM-3, Encl. 33) to 17 November 1973 (See Exh. MM-13, Encl. 33). In one of these letters the first defendant's solicitors alleged that the first agreement had been terminated with effect from 23 July 1973 (See Exh. MM-10, Encl. 33) but this alleged termination was declared wrongful by the plaintiff's solicitors on 14 November 1973 (See Exh. MM-12, Encl. 33). On 9 September 1973 the first defendant entered into another agreement with the second defendant, her brother-in-law ("the second agreement"), to sell the land to him (See Exh. MM-1, Encl. 33). The land was transferred to and registered in the second defendant's name on 13 March 1974. The present civil suit was filed on 20 September 1974 originally only against the first defendant for specific performance of the first agreement. On 28 June 1978 the plaintiff made an application for the entry of a private caveat against the register document of title to the land (See Exh. TT-1, Encl. 35) and on 10 March 1982 she applied for and on 21 April 1982 successfully obtained an order to amend the statement of claim adding the second defendant as a party to the suit, alleging fraud against both the defendants in respect of the sale and transfer of the land to the second defendant and praying *inter alia* for the cancellation of the memorial entered on the register document of title whereby the proprietorship of the land was transferred to the second defendant (See Encl. 19). In February 1983 the second defendant applied to the Registrar of Titles for the removal of the plaintiff's caveat and the removal was effected on 9 June 1983 following the gazetting of a notice of intended removal of the caveat (See Exh. MM-16, Encl. 33) after attempts at personal service of the notice had been unsuccessfully made at the plaintiff's previous address given in her aforementioned application for the private caveat. The plaintiff then entered a second caveat upon the land on 16 August 1983 (See Exh. SL-1, Encl. 34). Hence the second defendant's present application to have this second caveat removed.

After going through the very lengthy but enlightening submissions of Counsel for the parties in this application I am of the view that the pre-emptive question I have to address my mind to is: Does the removal *per se* of the private caveat in respect of the land by the Registrar extinguish the caveat altogether so as to prevent the same caveator, i.e. the plaintiff, from lodging another private caveat in respect of the land based on her alleged registrable interest derived from the first agreement?

I proceed now to answer the question. It is clear on the two oft-quoted authorities which deal with the relevant provisions of the National Land Code, *Arul Chandran v. Rajaratnam* [1979] 2 MLJ 172 and *Damodaran v. Vasudevan* [1974] 1 MLJ 128 that the Court has no power to revive, renew or continue a caveat after its lapse at the instance of the same

applicant on the same ground or grounds in respect of the same land. Counsel for the plaintiff in agreeing with this proposition of law has contended that it does not apply to the facts of the present case. As I understand him, he has two reasons for his contention. His first reason is that the second caveat has been entered on grounds different from those on which the first caveat was entered. In paragraph 2 of the plaintiff's first application for entry of a private caveat, the plaintiff has in fact given her alleged registrable interest arising from the agreement as the only ground. The basis of her application for the second caveat is reflected by four paragraphs which when paraphrased provide four additional grounds, namely the alleged wrongful refusal by the first defendant to perform the agreement and fraudulent transfer of the land by the first defendant to the caveatee, the institution of legal proceedings against the caveatee and the first defendant, the necessity to preserve the land pending the disposal of these proceedings, and the alleged non-service upon her of the Registrar's notice of intended removal of the first caveat. In *Damodaran's* case Syed Agil Barakbah J (as he then was) had this to say at page 129:

> The provision of s. 329 (2) require scrutiny. It disallows the Registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in cases where the Court has ordered the removal of the former or has turned down the removal of the former or has turned down an application for extension of time. The sub-section may be constructed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist.

I therefore hold that the second caveat entered by the plaintiff in respect of the land is not a renewal, revival or continuance of the first caveat by the same caveator on the same grounds as the first caveat and the plaintiff is therefore not precluded in law from filing the second caveat on differing grounds. The second reason given by Counsel for the plaintiff for the non-applicability of the abovementioned proposition of law is that the plaintiff had not been personally served with Form 19C, i.e. the notice of intended removal of the caveat at the expiration of one month from the date of the service of the notice, and consequently had no knowledge of it to apply to the Court under s. 326 (2) for extension of time. In my view the facts of the two authorities cited are distinguishable form those in the present case where although service upon the plaintiff is deemed (conceded by her Counsel so that I do not have to consider whether the provisions of s. 432 relating to substituted service have in fact been strictly complied with or not), the plaintiff did not have knowledge of the intended removal so as to enable her to exercise her right to apply to Court for extension of her first caveat unlike the facts in *Arul Chandran's* case where the caveator apparently ignored the "Collector's" notice to remove the caveat in Form 19C when recourse could have been had to the Court for extension of the caveat and the caveat accordingly was removed. As there has been no hearing *inter partes* (and accordingly no judgment on the merits) as to whether or not the first caveat should be removed or extended through no fault of the plaintiff and as I am of the view that the plaintiff's case falls outside the ambit of *Damodaran's* case and *Arul Chandran's* case, I do not think that the plaintiff is precluded from entering the second caveat. I am fortified in this view by the case of *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 214, where Lord Diplock at page 214 had this to say:

> Under the National Land Code there are alternative procedures for the removal of a caveat at the instance of the caveatee. Under s. 326 the caveatee may apply to the Registrar for its removal and the Registrar, **provided he is able to serve the caveator with notice of the application (as he was not in the instant case),** is required to remove the caveat from the Registrar at the expiry of one month from the date of such notice, unless the caveator applies successfully to the Court for an extension of the period for which the caveat shall remain on the register. (Emphasis is mine)

I would infer from the above passage that the plaintiff (caveator) must have notice and therefore actual knowledge of the application to remove the caveat before the removal can be considered extinguished and the extinction final and irrevocable.

As the answer to the pre-emptive question posed by me at the very outset is in the negative, I next have to consider the principles applicable to the exercise of the Court's jurisdiction with regard to the removal of private caveats under the National Land Code. These principles have been clearly laid down by the Privy Council in *Eng Mee Yong's case* where Lord Diplock stated at some length at page 215:

> In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e. the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s. 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under s. 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s. 327.
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> It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.
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> So far their Lordships have deliberately refrained from speaking of "onus of proof". It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The Court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the Court to be just and convenient to do so. Similarly in s. 327 it is provided that "the Court ... may make such order on the application as it may think just." The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a "probability", a "*prima facie* case" or a "strong *prima facie* case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried. *American Cyanamid v. Ethicon Ltd.* [1975] AC 396.
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> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.
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In the case of refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under s. 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

I do not think it can seriously be disputed, in view of the allegations of fraud levelled against the first and second defendants in regard to the second agreement, that there is a serious question to be tried despite the second defendant's denial of these allegation in his affidavit as I do not consider that I should be concerned with the probabilities of the assertions made by each of the parties or with their credibility at this interlocutory stage. I do not also think it can seriously be disputed, in view of s. 11 (2) of the Specific Relief Act, 1950, that this would be a proper case where specific performance would be ordered should the plaintiff be in the position of proving her case (See *Zaibun SA binti Syed Ahmad v. Loh Koon Moy* [1982] CLJ (Rep) 58). I am in fact satisfied that the affidavit evidence presented by both parties merits investigation for veracity at a trial and that on the balance of convenience it would be better to allow the second caveat of the plaintiff to remain until the trial so as to prevent any disposal of the land and the consequent destruction of the substratum of the suit.

That should really dispose of the application but Counsel for the second defendant has contended that the plaintiff has been guilty of laches or inordinate delay warranting the Court to exercise its discretion against her. I shall therefore have to consider whether the conduct of the plaintiff has been such as to disentitle her to equitable relief. In this regard I think one has to bear in mind that two firms of solicitors have acted for the plaintiff since her present suit was filed on 20 September 1974. The first was Ng Ek Tiong & Partners and the second Skrine & Co. I do not think dilatoriness or inordinate delay can be attributed to the plaintiff since the time Skrine & Co. came into the picture on 8 December 1980 (See Encl. 17) and then took the following steps: firstly, filing the application to amend the statement of claim on 10 March 1981 by adding the second defendant to the suit and alleging in essence fraudulent conduct against the first and second defendants (See Encl. 19); secondly, filing the defence to the second defendant's counterclaim on 3 August 1982 (See Encl. 26); and lastly, filing the summons for directions pursuant to O. 25 of the Rules of the High Court 1980 on 1 April 1983 (See Encl. 27), the hearing of which has been postponed. I think what could be in issue is the conduct of the plaintiff before Skrine & Co. came into the picture and acted with despatch as her solicitors. Was she guilty of laches or undue delay up to that time? Counsel for the second defendant has attempted to show this, firstly, by referring to the protracted correspondence between the then solicitors of the plaintiff and the solicitors of the first defendant and, secondly, by pointing out that the plaintiff entered her first caveat in respect of the land only on 28 June 1978, nearly four years after the filing of her present action on 20 September 1978, well after the second defendant had been registered as the proprietor of the land on 13 March 1974 and more than five years after the purported date of repudiation of the agreement on 23 July 1973. Counsel for the plaintiff concedes that there

has been delay but is unable to furnish any reason for it except to surmise that the plaintiff must have been advised by her previous solicitors that all was well in their conduct of her case. It is however, to my mind, most significant that no attempt has ever been made by either of the defendants to have the present suit struck off for want of prosecution. I have no reason to believe on the basis of the affidavits and other relevant documents in the file that the plaintiff's conduct has been intentional or contumelious or has prejudiced the defendants. Having regard to all the circumstances in this case I do not think it just and reasonable to penalise the plaintiff by exercising my discretion against her. Nor do I think that damages in this case will provide adequate remedy in the event that the plaintiff has suffered any injury. Nor do I think undue hardship will be caused to the second defendant as a result of the second caveat continuing in force.

In the result the application is dismissed with costs.

I would like to add that this is, in my view, a fit and proper case to go for early trial and I accordingly order that it be entered for early trial.

Also found at [1984] 1 CLJ 178